INDEX

Page

I. Summary Statement of Matter Involved 2

II. Jurisdiction 27

III. Questions Presented 28

IV. Reasons Relied On for the Allowance of the Writs 29

Brief in Support of Petition 35

I. Decisions in Courts Below 35

II. Statement of the Case 36

III. Assignment of Errors 36

IV. Argument 39

Synopsis of Argument 39

Proposition One: The Circuit Court of Appeals, after rejecting the trial court's finding that the 18-⅛% beneficial interest in the Trust was a gift to Doneghy, was bound either to remand the case for further and corrected findings by the trial court or, if it undertook to make its own findings was bound by facts averred and admitted in the pleadings and undisputed by anything in the record 41

Proposition Two: Estoppel is an affirmative defense and the burden of proving every essential element of it is on the one who asserts it and there is no evidence in this case that could under any view of the law support an estoppel against plaintiffs 49

Proposition Three: The property and rights in respect to property which Doneghy received on liquidation of the Company in 1915, comprising both

Page

compensation for services rendered and gain on his investment in stock in the Company, was not taxable income to him at any time, because his right to the compensation and the gain on his capital investment had accrued before and existed at March 1, 1913 57

Proposition Four: Under all the revenue acts compensation for services must be included in gross income, except where such compensation is the realization of a right to receive the same existing on March 1, 1913, and where services are paid for in property of any kind the fair market value of such property when received is the owner's cost basis therein for determining gain or loss on a sale thereof, and under the established facts in this case the decision and judgment of the Circuit Court of Appeals and of the trial court should be reversed by this Court with directions 61

Conclusion 63

TABLE OF THE CASES:

Alamo Nat'l Bank v. Com'r (5th C. C. A.), 95 Fed. (2d) 622 52

Aluminum Casting Co. v. Routzahn, 282 U. S. 92 56

Bell v. Morrison, 1 Peters 351, 360 56

Burnet v. Thompson Oil & Gas Co., 283 U. S. 301 56

Burnett v. Leininger, 285 U. S. 136 42

Com'r v. Farren (10th C. C. A.), 82 Fed. (2d) 141 52

Com'r v. Union Pac. R. Co. (2d C. C. A., 1936), 86 Fed. (2d) 637 . . . . . 31, 50

Crossett Lbr. Co. v. United States (8th C. C. A., 1937), 87 Fed. (2d) 930 . . . . . 32, 50

Page

E. D. Knight, 28 B. T. A. 188, 189 62

Farren v. Com'r, 298 U. S. 653 54
Farren v. Com'r, 299 U. S. 617 55
Fawcus Machine Co. v. United States, 282 U. S. 375 56

Gen. Util. Oper. Co. v. Helvering, 296 U. S. 200 42

Helvering v. Brooklyn City R. Co. (2d C. C. A., 1934), 72 Fed. (2d) 274 ..... 31, 50
Helvering v. Gowran, 302 U. S. 238, 245-246 46
Helvering v. Kehoe, 309 U. S. 277 42
Helvering v. Rankin, 295 U. S. 123 42
Helvering v. Salvage (1936), 297 U. S. 106 ..... 32, 50
Hull v. Com'r (4th C. C. A., 1937), 87 Fed. (2d) 260 ..... 31, 50

James H. Torrens, 31 B. T. A. 787, 795 62
J. Heninger et al., 9 B. T. A. 1318 62

Landigan v. Mayer, 32 Ore. 245, 51 Pac. 649, 67 A. S. R. 521 48
Louis Werner Saw Mill Co. v. Helvering (Ct. App., D. C., 1938), 96 Fed. (2d) 539 ..... 32, 50
Lynch v. Turrish (8th C. C. A., 1916), 236 Fed. 653 ..... 32, 59
Lynch v. Turrish, 247 U. S. 221 ..... 32, 59

McCaughn v. Real Estate Land Title Trust Co., 297 U. S. 606, 608 ..... 30, 41
McCrary v. Com'r, 298 U. S. 653 54
McCrary v. Com'r, 299 U. S. 617 55
McEachern v. Rose (1937), 302 U. S. 56 ..... 32, 50

Newman v. Com'r (10th C. C. A.), 41 Fed. (2d) 743 56

Page

Phillips v. Com'r, 283 U. S. 589 42
Pullman Co. v. Bullard (5th C. C. A., 1930), 44 Fed. (2d) 347 48

R. H. Stearns Co. v. United States, 291 U. S. 54 52
Robinson v. Com'r, 59 Fed. (2d) 1008 54

Salvage v. Com'r (2d C. C. A., 1935), 76 Fed. (2d) 112 .....31, 50
State Farm Mut. Auto. Ins. Co. v. Coughran, 303 U. S. 485, 487 .....31, 41

United States v. Oregon Lbr. Co., 260 U. S. 290 56
United States v. Scott & Sons (C. C. A. 1), 69 Fed. (2d) 728, 732 50

Van Antwerp v. United States (9th C. C. A., 1927), 92 Fed. (2d) 871 .....32, 49

Wilcoxson v. Burton, 27 Cal. 228, 87 Am. Dec. 66 48
William T. Bivim, 21 B. T. A. 1051 62

STATUTES AND TEXT BOOKS CITED:

Art. 33 of Regulations 45 62
Art. 87, Regulations 45 as amended by T. D. 3206, 5 C. B. 116 57
Art. 90, Regulations 62; Art. 87, Regulations 45 58
Art. 90, Reg. 65; Art. 90, Reg. 69; Art. 91, Reg. 74; Art. 90, Reg. 77 58
Art. 1548, Regulations 45 as amended by T. D. 3206, 5 C. B. 46 58

Rule 8(c), Federal Rules of Civil Procedure 49
Rule 8(d), Federal Rules of Civil Procedure.. 46
Rule 52(a), Fed. Rules of Civ. Proc...28, 30, 41

Page

Rule 75, Federal Rules of Civil Procedure, paras. (a), (d) and (e) 29, 30, 44

Sec. B(1) of the 1913 Act; Sec. 2(a)(1) of the 1916 Act; Sec. 213(a) of the 1918 Act; Paras. 52 to 54 of Regulations 33 Rev., and Art. 31 of Regulations 45 61

Sec. 113(a)(4), Revenue Act of 1928; Art. 1562, Reg. 45; Art. 595, Reg. 74 43

21 R. C. L. 604 47

In the Supreme Court of the United States

OCTOBER TERM, 1941

NO. . . . . .

JAMES DONEGHY and ST. LOUIS UNION TRUST COMPANY,
Residuary Trustees Under Item 23 of the Last
Will and Testament of James C.
Doneghy, Deceased,
Petitioners,

VERSUS

ACEL C. ALEXANDER, Formerly Collector
of Internal Revenue,
Respondent.

NO. . . . . .

JAMES DONEGHY and ST. LOUIS UNION TRUST COMPANY,
Residuary Trustees Under Item 23 of the Last
Will and Testament of James C.
Doneghy, Deceased,
Petitioners,

VERSUS

H. C. JONES, Collector of Internal Revenue,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTER INVOLVED

These cases originated in the United States District Court for the Western District of Oklahoma. They are suits to recover income taxes paid for the year 1930 and present precisely the same questions of law upon the same state of facts. The only reason for two lawsuits in the place of one is that part of the tax sought to be recovered was paid to respondent Alexander, then Collector of Internal Revenue for the District of Oklahoma, and the other part of it was later paid to respondent Jones, Alexander's successor in office. The cases were consolidated for trial in the district court and were decided upon one findings of fact and decision, although a separate judgment was entered in each case. On appeal to the Tenth Circuit Court of Appeals they were consolidated for hearing, argument and decision and one record was printed for both cases and one opinion in them was delivered by the court, although a separate decision and judgment was entered in each case. The Alexander case was No. 5644-Law in the district court and No. 2157 in the Circuit Court of Appeals and the Jones case was No. 5699-Law in the district court and No. 2158 in the Circuit Court of Appeals. Both cases were commenced by J. C. Doneghy, but he died while they were pending in the district court and the present petitioners by appropriate substitution were made plaintiffs in that court.

In some instances the name *Doneghy,* and the term *taxpayer* having reference to Doneghy, as used herein mean the

plaintiffs and petitioners. This meaning will appear from the context. All italics herein are ours unless otherwise indicated.

The facts may be summarized as follows:

On February 17, 1904, the Doneghy Investment Company, herein referred to as the Company, was incorporated under the laws then in force in Indian Territory. Its authorized capital was $100,000 which was divided into 4,000 shares of a par value of $25.00 each. One of its corporate purposes was to purchase, acquire, hold, rent, sell and convey land, and particularly Indian lands in the Indian Territory, and rights and interests therein (R. 42).

It was organized on February 23, 1904, by the election of directors and officers, and J. C. Doneghy was elected president and treasurer. Eighty thousand dollars in cash was paid in for 3,200 shares of its capital stock at or about the above date and no further sum was ever paid in on account of capital and no additional shares of stock were ever issued. Doneghy paid in $51,000 and acquired 2,040 shares, being 51/80 or 63¾% of all of its issued stock, and owned this amount continuously to April 26, 1915, when it was liquidated and all of its assets and property were distributed in liquidation (R. 42).

Upon the organization of the Company the directors by resolution authorized Doneghy as its president to make bids on Indian land and to sign and execute all papers necessary to purchase land offered for sale by the allottee or any other person through the Indian agent or any other agent or

owner of lands for the Company and also to make and sign deeds for land sold by the Company and to execute and sign any instrument that was necessary to transact business for it.

In respect of the compensation to be paid Doneghy for his services the resolution, adopted February 23, 1904, provides as follows:

> "On this proposition it was agreed and understood that the compensation of J. C. Doneghy as President and Manager of the Company was as follows:
>
> "He is to receive no salary, but is to be paid his actual expenses incurred in behalf of the Company, and then to receive ½ of all the net profits of all transactions." (R. 43.)

Under these resolutions the entire management and control of the business and affairs of the Company was turned over to Doneghy and he continued in the management of it for the compensation for his services fixed in the foregoing resolution until the Company was liquidated on April 26, 1915.

Beginning at least as early as January 1, 1912, and including January 1, 1919, he made an annual inventory and appraisal of all the assets of the Company and of its successor, the J. C. Doneghy Trust hereinafter referred to, for the purpose of keeping an accurate record of the properties of the Company and of the Trust and their values for his own information. Each of these was made at the beginning of a calendar year except the one for 1913, which was made on March 1, 1913 (R. 48-50).

The first Legislature after the erection of the State of Oklahoma enacted a law requiring all corporations doing business in the State, with certain exceptions which did not include the Company, to dispose of all real estate then owned by such corporations within seven years from May 26, 1908. (Oklahoma Session Laws, 1907-8, p. 197.) In order to comply with this statute the directors of the Company with the written consent of all the stockholders by resolution adopted April 26, 1915, authorized and directed the conveyance of all its lands to Doneghy to be held and disposed of by him in accordance with a trust agreement entered into between him and the stockholders on the same day. The consent and agreement referred to was made by all the other stockholders as parties of the first part with Doneghy as party of the second part and provides as follows:

> "That parties of the first part have consented that Doneghy Investment Company, shall make a conveyance of all the lands held by said corporation in compliance with the laws of Oklahoma requiring that corporations shall dispose of all lands within seven years from May 26, 1908, and that said lands shall be conveyed by Warranty Deed to said J. C. Doneghy, party of the Second Part.
>
> "That said second party shall as soon as he can do so, sell said land and make conveyance of same as to him may be deemed for the best interest of the parties hereto.
>
> "That said second party shall first deduct all his actual expenses incurred in behalf of the Doneghy Investment Company, and in the sale of this land, not heretofore received by him, and then to deduct for his services one-half of the net profits from the sale of said

lands; and pay out the remainder of said amount received from the sale of said lands as follows: A. G. Edwards & Sons, one-tenth, Edward Hidden, one-tenth, B. F. Edwards, one-tenth, John H. Carroll, one-sixteenth, and J. C. Doneghy, 51/80.

"For and in consideration of the benefits to be derived from this agreement, the parties hereto hereby agree to warrant the title to said lands to be sold, as their interest in said corporation appears." (R. 45.)

The resolution of the Board of Directors referred to provided as follows:

"Pursuant to an agreement among all the stockholders hereto attached, the following resolution was introduced and upon motion duly made and seconded, was unanimously adopted, to-wit:

"Resolved, That in order to comply with the laws of the State of Oklahoma, requiring all corporations to dispose of all lands within seven years from May 26, 1908, and in compliance with an agreement between the stockholders of this company and J. C. Doneghy, that the President of Doneghy Investment Co., be authorized and directed to convey all the lands of the Doneghy Investment Company with good and sufficient warranty deed to J. C. Doneghy for such consideration as he may deem sufficient and proper. Said real property and premises are to be held and disposed of by said J. C. Doneghy in accordance with an agreement entered into between the stockholders and J. C. Doneghy, said agreement being dated the 26th day of April, 1915." (R. 46.)

Pursuant to such consent, resolution and contract, the Company liquidated and conveyed all of its assets consisting of the lands which it then owned to Doneghy in trust

for the purpose and for the beneficiaries stated. This was the formation of the J. C. Doneghy Trust, herein referred to as the Trust, which is involved in these proceedings. (R. 42-43.)

It will be noted that none of the Company's land was conveyed to Doneghy in severalty and by title in his own right as compensation for services rendered under the contract of February 23, 1904. His 50% of the Company's lands in excess of $80,000 in value was deemed received by him in liquidation and reinvested in the Trust, which took over and held the Company's assets subject to the same rights and interests of the individuals therein as these had been subject to in the hands of the Company. Thereafter, as before, Doneghy was to receive "one-half of the net profits from the sale of said lands" for services and 51/80 or 63¾%, being his proportion of stock ownership in the Company, of the remainder.

The fair market value of these lands at April 26, 1915, as established by the testimony and inventory and appraisal of Doneghy was $531,819.58. This value was admitted by the defendant in his requested finding of fact No. 17 (R. 19) and found by the court to be correct (R. 27, 29). The court further found that this property had the same fair market value on March 1, 1913, that it did on April 26, 1915. The court said:

> "The defendant in his requested findings of fact, (Number 21) [17] admits that the inventory value of the assets acquired by the trust at the date of its creation on April 26, 1915, was $531,819.58 *and that said sum represented the fair market value of the trust as of*

the date of its creation. From the record in this case, the court finds that said sum of $531,819.58 was the fair market value of the property on March 1, 1913, as there is no indication of a change in the value during that period." (R. 27.)

As trustee of the Trust Doneghy continued in control and management of its property and estate from April 26, 1915, until after the calendar year 1930, the taxable year here involved.

On March 18, 1918, all the beneficiaries of the Trust, including Doneghy, entered into a supplemental trust agreement in which all the other beneficiaries were first parties and Doneghy second party. This supplemental agreement provided as follows:

"That parties of the first part have consented that Doneghy Investment Company, Doneghy Oil Company and Pioneer Land Co., of Muskogee, Oklahoma, shall make a conveyance of all the lands and property held by them in compliance with the laws of Oklahoma, requiring that corporations shall dispose of all lands within seven years from May 26, 1908; and that said lands and property shall be conveyed by warranty deed to said J. C. Doneghy, party of the second part.

"That said Second Party may sell said land and property and make conveyance of same as to him may be deemed for the best interest of the parties hereto; and may during the period of said sale, with the proceeds, purchase and sell other lands and oil leases, provided it is in his judgment for the best interest of said parties.

"That said second party shall first deduct all his actual expenses incurred in behalf of the Doneghy Investment Company, Doneghy Oil Company, Pioneer

Land Company, and in the sale of the land, leases and reservations so held by him under this trust, and then pay to the parties hereto the sum of $80,000.00, according to their interests in the Doneghy Investment Company, being the amount originally invested in the stock of the Doneghy Investment Company. After said sum has been paid to the parties hereto, then the interests of said parties in the balance of the land, leases, reservations and other property held or acquired by said second party for this trust, shall be as follows: A. G. Edwards Sons 5%, Edward Hidden 5%, B. F. Edwards 5%, J. H. Carroll 3⅛%, J. C. Doneghy, 81⅞%, and upon this basis shall all future distributions be made, after deducting all actual expenses as aforesaid." (R. 47.)

The Doneghy Oil Company and the Pioneer Land Company referred to were subsidiaries of the Doneghy Investment Company and whatever lands stood in the name of these corporations belonged to Doneghy Investment Company and were included in the *corpus* of the trust created by the agreement of April 26, 1915, in compliance with the laws of Oklahoma requiring corporations to dispose of their land within seven years from May 26, 1908.

It will be observed that after the execution of said supplemental agreement of March 18, 1918, Doneghy had precisely the same interest in the property of the Trust, if it had then liquidated at its fair market value, that he had in the property of first the Company and then the Trust on April 26, 1915, if this property had then been distributed in severalty to the natural persons entitled to receive it and the enterprise finally wound up. The Company's total cost in its

property was its paid-in capital of $80,000. All it ever accumulated in excess of that sum was profit. If either on March 1, 1913, or at its liquidation on April 26, 1915, it had converted its lands into cash at their fair market value of $531,819.58 and had distributed this sum under the agreement of February 23, 1904, the distribution would have been as follows:

Amount to be distributed		$531,819.58	
Less cost (original capital investment)		80,000.00	
Net profits		451,819.58	
One-half of net profits to Doneghy for services		225,909.79	$225,909.79
Other half of net profits	$225,909.79		
Plus original investment	80,000.00		
Amount to be distributed to stockholders		305,909.79	
63¾% (51/80) to Doneghy as stockholder	195,017.49		195,017.49
36¼% (29/80) to other stockholders	110,892.30	305,909.79	
Total to be received by Doneghy			$420,927.28

The fair market value of the property of the Trust at March 18, 1918, was substantially the same as at April 26, 1915, and March 1, 1913 (R. 50), and if it had been converted into cash and distributed after and under the provisions of that agreement, the distribution would have been as follows:

Amount to be distributed	$531,819.58
Less original investment first deducted	80,000.00
	451,819.58
81⅞% of $451,819.58 to Doneghy	369,927.28
63¾% (51/80) of $80,000.00 to Doneghy	51,000.00
Amount to be received by Doneghy	$420,927.28
Amount to other beneficiaries	$110,892.30

It is plain that 50% of all net profits of the Company or of the Trust, plus 63¾% of its remaining assets, at April 26, 1915, or at March 18, 1918, and 63¾% of $80,000 plus 81⅞% of the remainder are exact mathematical equivalents. By the 1918 agreement Doneghy did not acquire anything that he was not entitled to receive before and the other beneficiaries of the Trust did not part with anything which they were entitled to retain, and all of them understood that they were settling and rearranging their property interests according to their contract rights.

Although Doneghy was not to receive his share of the net profits for services except as profits were realized through the sale of lands, yet he had the vested right to have the lands which represented accumulated profits converted into money and his share of the profits thus realized paid to him whenever the whole enterprise was finally liquidated, unless he and the others should agree that he might take his share of the net profits in land instead of money. So when in 1918 the other beneficiaries transferred one-half of their percentages of interest in the Trust to him, this satisfied all his claim against accumulated profits of the Trust for services, and thereafter, instead of having an interest of 50% in the profits realized by the Trust and

63¾% of the remainder, he had 81⅞% of all the Trust after distributing the $80,000 originally invested. Thus the agreement of March 18 merely changed Doneghy's claim against the Trust for compensation for services into a percentage of beneficial interest in the Trust without gain or loss to any party.

Doneghy made an income tax return for all years (R. 25) and his returns for 1915 and 1918 are in evidence (R. 73-80, 87-89). On his 1915 income tax return he reported $20,000 on the line for "Salaries and wages." He did not on either return report any income derived from liquidation of the Company or from the acquisition of a larger beneficial interest in the Trust. On his return for 1918 he showed and paid a tax of $1,060.23, but this return was reviewed and audited by the Commissioner and additional tax of $4,431.49 and a 5% penalty of $221.57 was assessed, apparently under date of May 3, 1921 (R. 87). There was much evidence introduced upon the trial in respect of the investigation by a revenue agent of Doneghy's income tax liability for 1918 and the auditing of his return, especially with reference to the question of whether depletion on oil properties of the Trust was allowable to the Trust or to him to the extent of his beneficial interest in it. In preparing the record under paragraphs (a), (d) and (c) of Rule 75 of the Federal Rules of Civil Procedure, this was deemed not essential to the questions presented on appeal and was omitted.

The value of the 18⅛% interest in the corpus of the Trust acquired by Doneghy in 1918 in exchange for his right to share in its profits was $96,836.98 (R. 31). There was

only a nominal increase in the assets of the Trust between April 26, 1915, and March 18, 1918.

On June 30, 1930, Doneghy sold to James Doneghy, a nephew, a 25% beneficial interest in the Trust, being 30.534351% of the 81⅞% beneficial interest therein then owned by him, for the price of $62,500 (R. 48). After the formation of the Trust in 1915, and in fact between 1918 and 1930, distributions were made to the beneficiaries which exceeded earnings and were in part distributions from the capital or corpus of the trust estate transferred to it upon its creation in 1915. The amount of these capital distributions as fixed by the court was $91,519.88 (R. 28, 29) in which was included the $80,000 original investment in stock of the Company.

On his return for 1930 Doneghy claimed a cost in the 25% beneficial interest in the Trust which he sold to James Doneghy of $94,350.66, and upon deducting the sale price of $62,500 for that interest, determined a net loss on the sale of $31,850.66 (R. 55, Schedule D). After filing the return an investigation of his income tax liability for 1930 was made by a revenue agent. In the report of his investigation the agent disallowed the loss claimed by Doneghy on the sale of the 25% beneficial interest and determined that, instead of sustaining a loss, he had realized a gain on that sale. This result was arrived at by revising and reducing the fair market value of the assets of the Company transferred upon its liquidation through its stockholders to the Trust and disallowing any cost in the 18⅛% interest in the trust estate placed in Doneghy by the agreement of

1918, whether this was to be deemed as acquired in 1915 or in 1918.

Since the cases have different numbers in the district court and in the Appeals Court and in this Court, they will, to avoid confusion, be referred to as the Alexander case and the Jones case.

The petition in the Alexander case alleges grounds of jurisdiction and the office of the defendant as a former Collector of Internal Revenue; that the taxpayer erroneously reported a net income of $72,137.21 on his return for 1930 and computed and paid the tax due thereon; that by inadvertence and mistake in the preparation of his return he claimed and took a deduction from gross income thereon of a loss of only $31,850.66 on the sale of a 25% beneficial interest in the J. C. Doneghy Trust, while in truth and in fact the loss he sustained on that sale was $47,574.92, or $15,724.26 greater than that claimed and taken; that such erroneous understatement of that loss deduction resulted in an overpayment of tax in the sum of $1,965.53; that the tax computed to be due and assessed on his return was $12,-144.25, which he paid in four equal installments on March 6, June 1, September 2 and December 3, 1931; that on February 17, 1933, he filed with the Commissioner of Internal Revenue a claim for refund of all of the above amount of tax paid by him and on June 11, 1934, filed an amended claim for refund thereof based on the same grounds as those alleged in his petition for his right to recover; and that these claims were in due course rejected by the Commissioner.

He prays for recovery of $1,965.53 with interest from the dates of payment as provided by law (R. 97-99).

In the Jones case the petition alleges grounds of jurisdiction and the office of the defendant as Collector of Internal Revenue and the same facts with respect to error in the plaintiff's original return for 1930, due to the understatement by inadvertence and mistake of the loss sustained on the sale of a beneficial interest in the Trust, which are alleged in the Alexander case. Then it further alleges that following an investigation and report by a revenue agent of the taxpayer's income tax liability for the year 1930, the Commissioner determined a deficiency in his income tax for that year of $7,638.20; that upon being notified by letter from the Commissioner of the determination of such deficiency and on June 11, 1934, he paid the amount thereof to the defendant as Collector with interest thereon of $1,-483.09, making a total payment of tax and interest of $9,-121.29; that this sum was erroneously, wrongfully and illegally collected, and on December 28, 1934, he filed with the Commissioner a claim for refund of it, based on the same grounds as those set forth in his petition for a recovery; and that thereafter his claim was in due course rejected by the Commissioner. He prays for recovery of $9,121.29 with interest from June 11, 1934 (R. 6-8).

The defendant in each case by his answer admitted the jurisdictional matter and his position as Collector, the payment of the stated amounts of tax and interest to him, the filing of a claim for refund by the plaintiff and the rejection thereof as in the petition alleged, but denied that the

plaintiff sustained a loss in any amount on the sale of a beneficial interest in the Trust, and averred that instead he realized a taxable gain of $29,255 on that sale and that the original tax and the deficiency in tax and interest were rightfully and legally assessed and collected (R. 99-100, 8-10).

To these answers the plaintiff filed in each case a reply of general denial of all matter in conflict with the allegations of the petition (R. 9, 101).

On the day the cases were called for trial the defendant in each case filed an amendment to his answer setting up a new defense. This amendment is in identical language in each case as follows:

> "As a separate and distinct defense in this action, defendant alleges:
>
> "That the plaintiff is estopped to deny that the original cost basis of his interest in J. C. Doneghy trust is the amount of $51,000 and no more because of the following facts and circumstances:
>
> "That prior to March 1, 1913, plaintiff acquired stock in Doneghy Investment Company, a corporation organized in 1904 under the laws of Indian Territory, at a cost to him of $51,000. That plaintiff's cost basis in this stock was no greater than $51,000 on March 1, 1913. That on April 26, 1915, Doneghy Investment Company was liquidated and plaintiff as the owner of 63¾% of the stock of the corporation received 63¾% of the corporation's assets. That plaintiff did not report for income tax purposes on his 1915 income tax return or on any subsequent income tax return any taxable gain as a result of this transaction. That as a result of plaintiff's own omission to report any taxable gain in

1915 by reason of this transaction the taxable gain realized by plaintiff at that time has wholly escaped taxation. That the period within which the Commissioner of Internal Revenue might assess a deficiency tax against the plaintiff for the year 1915 expired long prior to 1930. *That through an exchange of his share of the proceeds of the liquidation of Doneghy Investment Company plaintiff acquired the interest in the J. C. Doneghy trust held by him from April 26, 1915, until 1930, during which latter year the plaintiff sold a portion of his interest in the trust.*" (R. 10-11, 102-103.)

To this the plaintiffs replied in each case with a general denial and further as follows:

"That they admit that J. C. Doneghy, the original plaintiff herein and now deceased, acquired stock prior to March 1, 1913, in Doneghy Investment Company, a corporation organized in 1904 under the laws of Indian Territory, at a cost to him of $51,000.00, and they aver that he acquired said stock on February 23, 1904, and further aver that the total paid in capital of said corporation was $80,000 evidenced by 3200 shares of the par value of $25.00 a share, of which J. C. Doneghy then acquired 2040 shares, or 63¾% of the total issued stock of the corporation, but they specifically deny that his cost basis in this stock was no greater than $51,000 on March 1, 1913.

"III.

"That they admit that on April 26, 1915, Doneghy Investment Company was liquidated and that J. C. Doneghy, as the owner of 63¾% of the stock of that corporation, received 63¾% of its assets which were distributable to its stockholders on liquidation, and they aver that he also received one-half of all property and assets which it then owned in excess of $80,000 in value

as compensation for services rendered it by him during the period from February 23, 1904, to April 26, 1915, but they do not have knowledge whether he failed to report for income tax purposes on his 1915 income tax return any taxable gain as a result of that transaction and so they deny that he did not report any such taxable gain on his income tax return for 1915, and they aver that he did not in any event have any taxable gain as a result of that transaction in 1915, and they admit that the period within which the Commissioner of Internal Revenue might assess a deficiency against him for the year 1915 expired long prior to 1930.

"IV.

"*That they admit that it was through an exchange of his share of the proceeds of the liquidation of Doneghy Investment Company,* including the portion of such proceeds distributed to him in compensation for services as above set forth, *that J. C. Doneghy acquired the interest in the J. C. Doneghy Trust held by him from April 26, 1915, until 1930, in which year he sold a portion of his interest in said trust.*" (R. 12-13, 103-104.)

The trial court found for the plaintiffs on all issues except as to the inclusion in the cost basis of Doneghy's beneficial interest in the Trust, a part of which he sold in 1930, of the 18⅛% interest acquired in 1918. He found that this was a gift or donation from the other beneficiaries to Doneghy and concluded as a matter of law that, because it was a gift, Doneghy had no cost in it that would be deductible from the sale price to determine gain or loss on a sale. He made no specific finding against the affirmative defense of estoppel plead by the defendants, but his finding and conclusion that Doneghy had a cost basis of 63¾% of the value

of the property transferred from the Company to the Trust in 1915 (R. 27, 29) necessarily negatives that defense.

Reference is here made to such findings of the trial court as are deemed pertinent to the errors complained of.

The court found that:

> "Doneghy made his personal income tax reports regularly for all of the years after the enactment of the income tax law until 1930 and in these various reports he included the income that he had actually received from the Doneghy trust." (R. 25.)

Then the court states what he says is the contention of the taxpayer (R. 26). This statement is correct, *except that the taxpayer did not contend that Doneghy's interest in the assets transferred from the Company to the Trust was 51/80 or 63¾%, and hence only $339,034.98.* The taxpayer's contention was and is that Doneghy's interest in those transferred assets, and hence his interest in the assets constituting the corpus of the Trust, *was 50% of the amount of all thereof in excess of $80,000 and 63¾% of all the remainder, and hence $420,927.28* (page 10, *supra*), *instead of only $339,034.98 as stated by the court.*

Then the court found further as follows:

> "The trust agreement continued the arrangement that was made in 1904 of paying the taxpayer, as manager of the Trust, his actual expenses and one-half of the net profits from the sale of the lands. The only provision for distribution was after the sale of lands and there was no provision for vesting in the taxpayer an undivided one-half interest in the accumulated profits resulting from an increased value of the lands. In other

words, before there could be any distribution of profits, a sale must have been made. The taxpayer, according to the records, received his one-half of the net profits from the sales of land until 1918." (R. 27.)

The petitioners regard this as a correct statement of fact, but point out that, even though there was no provision for distribution of profits until realized by the sale of lands of the Company and later of the Trust, still since the Company had accumulated a surplus of $451,819.58 at March 1, 1913, and had this surplus on April 26, 1915, in the form of land, Doneghy could not be deprived of his contractual right to have this surplus converted into money and his share of the profits thus realized distributed to him whenever the whole enterprise was liquidated, but the Company only, and not the whole enterprise, was liquidated when its assets were transferred to the Trust as a substitute for it.

The petitioners maintain there is no significance in the admitted fact that Doneghy received his share of net profits from the sales of land as these were made and net profits realized and distributed to the interested parties according to their respective rights and interests until 1918 (R. 27).

The court found that the value of the property transferred by the Company to the Trust in 1915 was $531,819.58 and that this property had the same value in the hands of the Company on March 1, 1913 (R. 27).

The court said:

"Doneghy made his income tax reports regularly from 1915 to 1930, but at no time did he ever assert that he had made an additional capital investment in the trust

with which to pay for the additional 18⅛ per cent." (R. 27.)

There is no significance in the statement that Doneghy did not in his income tax reports show an additional capital investment in the Trust with which to pay for the additional percentage of interest acquired therein in 1918. There is no requirement, and no reason outside of any requirement, for a taxpayer to report his capital investments on his income tax return. Income tax returns deal with income and deductions and not with capital investments.

Then the trial court said:

> "It is the contention of the taxpayer that this 18⅛% was given to him because of services rendered and to be rendered. The trust agreement of 1918, however, did not make any such provision but made provision for paying the expenses from the sales of lands or properties belonging to the trust, and there is nothing in the record to indicate that the taxpayer did not receive his full one-half of the net profits from sales of trust property until 1918." (R. 27-28.)

This is not an entirely accurate statement of the taxpayer's contention in this respect. His contention was and is that he had earned under his contracts first with the Company and then with the Trust the right to share in accumulated profits when realized by sales as compensation for services and that this right still existed in 1918. At that time the parties, instead of selling the Trust property and realizing the accumulated profits in money and distributing the money, by voluntary agreement distributed to Doneghy in property the amount that would have been distributable to

him in money, if the property had been converted into money at its then fair market value. The 1918 agreement was merely a method of paying an indebtedness of the Trust to Doneghy which all the parties recognized.

It is again pointed out that the fact that the taxpayer may have received, and presumably did receive, his full one-half of the net profits from the sales of Trust property until 1918 has no significance or relation to the division of accumulated profits in the form of property made by the 1918 agreement in lieu of converting the property into money and distributing the money.

Then the trial court said:

> "There was apparently no consideration for this additional interest other than the fact that the minority holders of interests in the trust had already received almost twice the amount of their original investment. The estate, including the year 1930, had paid in dividends, $1,072,000." (R. 28.)

Of course the holders of interests in the Trust could not know in 1918 what amount of dividends would be paid by the end of 1930. And the court specifically found that Doneghy included in his returns until 1930 all the income that he received from the Trust (R. 25).

In the statement last quoted the court ignores the averment in the defendant's answer and the admission thereof in plaintiff's reply:

> "That through an exchange of his share of the proceeds of the liquidation of Doneghy Investment Company plaintiff acquired the interest in the J. C. Done-

ghy Trust held by him from April 26, 1915, to 1930, during which latter year the plaintiff sold a portion of his interest in the trust." (R. 10-11, 102-103, 12-13, 103-104.)

Then the court concludes as a matter of law that the 18⅛% additional interest in the Trust acquired by the taxpayer in 1918 was without consideration and was a gift or donation to him by his associate beneficiaries under the Trust (R. 28).

By an amendment to this conclusion of law, which was really in the nature of a further finding of fact, the court added the folowing:

"The fair market value of this additional interest of 18⅛% so acquired by the taxpayer by gift or donation was $96,836.98 when acquired." (R. 31.)

Then the court in its third conclusion of law made a computation to determine the loss to the taxpayer on the interest in the Trust sold in 1930. The method of this computation is correct, but the court erred in that he did not recognize that Doneghy was entitled to any part of the accumulated profits of the Company in 1915 or of the Trust in 1918 as compensation for services. Then, treating the 18⅛% interest in the Trust as a gift to Doneghy in 1918, the court further erred in not recognizing its fair market value at that time as Doneghy's cost basis in it.

The Circuit Court of Appeals, after rejecting as erroneous the trial court's finding that the 18⅛% of additional interest in the corpus of the Trust transferred to Doneghy in 1918 was a gift from the other beneficiaries, made its own

findings of fact on the record, which showed on its face that it included only a portion of the evidence and proceedings upon the trial (R. 42), and affirmed the judgment of the trial court on two alternative grounds (R. 114-115).

In the opinion it makes the following erroneous statement of the petitioner's contention:

> "The major contention of plaintiffs is that from the formation of the trust in 1915 to the execution of the agreement in 1918, the taxpayer owned 63¾% of $80,000 of the assets and 50% of the balance; that the 50% represented compensation for services rendered the trust."

The petitioners never contended that, either during the period of the Company or the period of the Trust, the taxpayer owned 63¾% of $80,000 of the Company assets or the Trust assets and 50% of the balance. Their contention was and is that during the period of the Company the taxpayer equitably owned, or the Company owed to him, 50% of all its assets in excess of $80,000 and 63¾% of the balance, being the other half of such excess plus $80,000, and that during the period of the Trust the taxpayer actually owned, or the Trust owed to him, one-half of all Trust assets in excess of $80,000 and 63¾% of the balance, being the other half of such excess plus $80,000. A mathematical computation will show that the amount of the interest claimed first in Company assets and then in Trust assets as thus stated, is a very different amount from that which would result upon the Court's statement of the plaintiff's contention.

And, regardless of the amount of the interest in the Trust claimed for the taxpayer, the Court's statement that plaintiffs contended that this "represented compensation for services rendered the trust" is also erroneous, for that their contention was that the taxpayer's right to a share in the assets of the Trust which was finally satisfied by the acquisition of an additional 18⅛% in the corpus of the Trust in 1918 represented primarily compensation for services from 1904 which were realized on liquidation of the Company in 1915 and reinvested in the Trust.

Then, since if the increased interest in the Trust was not a gift, there must have been a consideration for it, the Appeals Court says that the burden was on the plaintiffs to show what the consideration for it actually was, and that the record does not show that there was anything at all due to the taxpayer from the Trust in 1918, and that so far as the record shows he might have exchanged property or paid cash out of his pocket for the increased interest. Then the Court concludes that the judgment of the trial court should be affirmed, because the petitioners failed to carry the burden of proof resting upon them to show what consideration the taxpayer actually paid for the increased interest.

In this the Appeals Court has utterly ignored the averment in the defendants' answers and the admission thereof in the plaintiffs' replies:

> "That through an exchange of his share of the proceeds of the liquidation of Doneghy Investment Company plaintiff acquired the interest in the J. C. Doneghy Trust held by him from April 26, 1915 until 1930." (R. 11, 12, 102, 104.)

It was because facts averred in the pleadings of one party specifically admitted to be true in the pleadings of the adverse party are, under the most elementary rules and in all jurisdictions, to be taken as true, that evidence introduced upon the trial to the effect that there was no consideration paid by the taxpayer outside of whatever claim he had against the Trust under the contracts of February 23, 1904, and April 26, 1915, for the increased interest acquired in 1918, was omitted from the record on appeal.

Then as an alternative the Appeals Court held that as a matter of fact and law the judgment of the trial court should be affirmed on the ground that Doneghy was estopped to claim any cost basis in the increased interest acquired in 1918 to determine the amount of the loss on the sale of an interest in 1930.

The only estoppel plead by the defendants was in respect of the year 1915 and the only fact averred to establish an estoppel in any year was that the taxpayer omitted to show on any return any gain realized on liquidation of the Company (R. 11, 102). They averred that the cost basis of Doneghy's stock on liquidation of the Company in 1915 was the $51,000 which he had originally paid in, and that all that he realized on such liquidation in excess of the $51,000 was taxable gain to him in that year (R. 11, 102). The trial court made no specific finding on the issue of estoppel, but did find and allow a cost of $339,034.98 in the interest acquired by Doneghy in the corpus of the Trust in 1915. This was in effect both a finding of fact and conclusion of law

that the defendants had not sustained their defense of an estoppel.

The Appeals Court held that if the increased interest in the Trust acquired in 1918 was to be deemed compensation for services, regardless of when rendered, then it represented earnings realized in that year and the value of that interest was taxable gain to the taxpayer, and that, upon the solitary fact and no other that it was not included in income on his return for that year, the estoppel plead by the defendants in respect of the year 1915 applied to the year 1918 and was established by the evidence, and that the judgment of the trial court would be affirmed on that ground.

II.

JURISDICTION

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is March 6, 1941 (R. 115-116). The opinion of the Court was handed down on the same day (R. 111).

2. The statutory provision under which the jurisdiction of this Court is invoked and which is believed to sustain its jurisdiction is Section 347(a) of Title 28 of the United States Code, being Section 240 of the Judicial Code, as amended.

3. The decision of the court below is in conflict with the decisions of various Circuit Courts of Appeals and of this Court and decides an important question of Federal law which apparently has not been, but should be, settled

by this Court and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. This Court entertains jurisdiction to grant writs of certiorari in similar cases at every term, and there can be no need to list any of the great array of cases in which its jurisdiction is so exercised.

4. The petition for the writs is presented under Rule 38, paragraph 5(b), of the Revised Rules of this Court adopted February 13, 1939, and effective February 27, 1939.

III.

QUESTIONS PRESENTED

The questions presented on this petition may be broadly stated as follows:

1. Can the Circuit Court of Appeals, on these appeals in law actions tried to the Court, after setting aside under Rule 52(a) of the Federal Rules of Civil Procedure the fact finding on which the trial court based its judgment, make its own fact findings on questions not passed on or passed on adversely by the trial court and thereon affirm the judgment of the trial court?

2. If the foregoing question is answered in the affirmative, can the Circuit Court of Appeals make a finding that a fact specifically averred in the pleading of one party, and expressly admitted in the pleading of the adverse party is not established as a fact for want of evidence and thereon affirm the judgment of the trial court?

3. Where a transcript of only that portion of the proceedings and evidence in the trial court deemed essential to the decision of the questions presented by the appeal is brought up in the record on appeal under paragraphs (a), (d) and (e) of Rule 75 of the Federal Rules of Civil Procedure, can the Circuit Court of Appeals, after setting aside the fact finding on which the trial court based its judgment, make its own fact findings on such portion of the proceedings and evidence before it on questions not passed on or passed on adversely by the trial court and thereon affirm the judgment of that court?

4. Are the facts in the record before the Circuit Court of Appeals in these cases upon any view of them sufficient as a matter of law to sustain the estoppel plead by the defendants?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS

1. The Circuit Court of Appeals, in holding that there was no proof in the record that the increased interest in the trust estate transferred to the taxpayer in 1918 was compensation for services rendered to the Doneghy Investment Company from 1904 to 1915, and in also holding that the record did not show for what consideration he acquired that interest, has disregarded the fact averred by defendants and admitted by plaintiffs in their respective pleadings that it was "through an exchange of his share of the proceeds of

the liquidation of Doneghy Investment Company" that he acquired all the interest in the Trust that he held from April 26, 1915, until 1930, and has rendered a decision in conflict with the elementary rule that facts averred in the pleadings of one party and admitted in the pleadings of the adverse party are established facts in the case and in conflict with all court decisions in every jurisdiction on that subject, and in rendering such decision has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

2. The Circuit Court of Appeals in deciding that, after setting aside as clearly erroneous the finding of the trial court that the increased interest in the trust estate transferred to the taxpayer in 1918 was a gift, it could and would, notwithstanding these were law actions tried to the court without a jury, make its own findings as to the facts which the record proved or failed to prove and render a decision on its own findings, where a transcript of only that portion of the evidence and proceedings upon the trial deemed sufficient to show the error of the trial court was brought up in the record under paragraphs (a), (d) and (e) of Rule 75 of the Federal Rules of Civil Procedure, instead of remanding the case to the trial court for corrected and further findings, has rendered a decision in conflict with the purpose and intent of said paragraphs of said Rule 75 and in conflict with Rule 52(a) of said Federal Rules of Civil Procedure and in conflict with the decisions of this Court in *McCaughn* v. *Real Estate Land Title Trust Co.*, 297 U. S.

606, 608, and *State Farm Mut. Aut. Ins. Co.* v. *Coughran*, 303 U. S. 485, 487, and cases cited in those cases, for even though the holding in those cases is deemed modified by said Rule 52(a) to the extent that the Appellate Court in a law action tried to the court without a jury may set aside a clearly erroneous finding of the trial court, still the Appellate Court is without power to make its own findings on questions on which the trial court made no finding and on such findings of its own to affirm the judgment of the trial court.

3. The Circuit Court of Appeals, in deciding that the mere omission by the taxpayer from gross income on his return of the fair market value of the increased interest in the trust estate transferred to him in 1918, assuming it was taxable income in that year, was sufficient, of itself alone and notwithstanding his return was audited and additional tax for that year assessed against him by the Commissioner, to sustain the defense of estoppel plead by the defendants in respect of the year 1915 against the taxpayer's claim that the fair market value of this increased interest in 1918 was includable in the cost basis of his entire beneficial interest in the Trust to determine his loss on the sale of a portion thereof in 1930, has rendered a decision in conflict with the decisions of the Circuit Court of Appeals of the Second Circuit in *Helvering* v. *Brooklyn City R. Co.*, 72 Fed. (2d) 274; *Salvage* v. *Commissioner*, 76 Fed. (2d) 112, and *Commissioner* v. *Union Pac. R. Co.*, 86 Fed. (2d) 637, and with the decision of the Circuit Court of Appeals of the Fourth Circuit in *Hull* v. *Commissioner*, 87 Fed. (2d) 260, and with the

decision of the Circuit Court of Appeals of the Eighth Circuit in *Crossett Lumber Co.* v. *United States*, 87 Fed. (2d) 930, and with the decision of the Circuit Court of Appeals of the Ninth Circuit in *Van Antwerp* v. *United States*, 92 Fed. (2d) 871, and with the decision of the Court of Appeals of the District of Columbia in *Louis Werner Saw Mill Co.* v. *Helvering*, 96 Fed. (2d) 539, and with the decisions of this Court in *Helvering* v. *Salvage*, 297 U. S. 106, and *McEachern* v. *Rose*, 302 U. S. 56, upon the same matter.

4. The Circuit Court of Appeals in deciding that, if the increased interest in the trust estate acquired by the taxpayer in 1918 was in settlement of his claim to compensation for services rendered, then the fair market value of that interest was includable in his gross income for that year under the provisions of Section 213 of the Revenue Act of 1918, 40 Stat. 1057, 1065, has rendered a decision in disregard of the fact that the right to that compensation had accrued to him prior to March 1, 1913, and in conflict with Articles 87 and 1548 of Treasury Regulations 45 as amended by Treasury Decision 3206, 5 Cumulative Bulletin 116 and 46, and with all subsequent Treasury Regulations on the subject and with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Lynch* v. *Turrish*, 236 Fed. 653, and with the decision of this Court in *Lynch* v. *Turrish*, 247 U. S. 221, upon the same matter.

Wherefore, your petitioners pray that writs of certiorari under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit at

Denver, Colorado, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in case No. 2157, entitled *James Doneghy and St. Louis Union Trust Company, Residuary Trustees under Item 23 of the Last Will and Testament of James C. Doneghy, Deceased, Appellants,* v. *Acel C. Alexander, formerly Collector of Internal Revenue, Appellee,* and in case No. 2158, entitled *James Doneghy and St. Louis Union Trust Company, Residuary Trustees under Item 23 of the Last Will and Testament of James C. Doneghy, Deceased, Appellants,* v. *H. C. Jones, Collector of Internal Revenue, Appellee,* to the end that said causes and each of them may be reviewed and determined by this Court as provided by the statutes of the United States and that the judgments of said United States Circuit Court of Appeals in each of said cases be reversed by this Court, and that petitioners have such further relief as to this Court may seem proper.

Dated at Oklahoma City, Oklahoma, this 29th day of May, 1941.

JAMES DONEGHY AND ST. LOUIS UNION TRUST COMPANY, Residuary Trustees Under Item 23 of the Last Will and Testiment of James C. Doneghy, Deceased, Petitioners,

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